87-870

Supreme Court, U.S.
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No. _____

In The

Supreme Court Of The United States

OCTOBER TERM, 1987

STATE OF CONNECTICUT,
Petitioner,

v.

CHARLES JARZBEK,
Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

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STATEMENT OF THE CASE

The respondent Charles Jarzbek was charged in the Connecticut Superior Court with the offense of risk of injury to or impairing the morals of a child and sexual assault in the fourth degree involving his two children then aged four and three. Prior to trial the state filed a motion to allow videotaping of witnesses which motion requested the children testify on videotape "outside the presence of the defendant and the jury." The state relied upon the common law powers of the Court in support of said motion as Connecticut's statute relating to videotaping in such cases had yet to become effective.

The trial court conducted an evidentiary hearing on said motion at which the state produced two clinical psychologists as witnesses. The first did not interview either child but expressed the opinion that "the use of videotaping is far superior than having a child face the alleged perpetrator." This testimony was based upon the witness' view that testimony in court may prove traumatic to a child as well as an adult. (Pre-trial Tr. 7/29/85, pp. 8–10, 12). The second witness who did interview the children expressed the opinion that they would "benefit" from the videotaping procedure. Although this witness indicated that witness T.J. would be "quite upset to testify in front of her father," he stated that she was also distressed in discussing the subject with the Doctor in his office. (Pre-trial Tr. 7/30/85, p. 14).

The trial court granted the state's motion and ordered that the defendant be excluded from being physically present at the videotaping of the testimony. The defendant was only given the opportunity to sit in a room other than that with the judge, witness and attorneys, view the proceedings by means of a monitor and communicate with his attorney by means of "an ear attachment or other similar communicating device." Said testimony was videotaped in the absence of the defendant, played to the jury and the defendant convicted.

On October 4, 1985 the defendant received a total effective sentence of five years, execution suspended and five years probation. On the same date he filed his appeal to the Connecticut Supreme Court. Said appeal asserted that the order of the trial court permitting the videotaping of testimony of the complaining witness outside the presence of the defendant violated the defendant's state and federal constitutional rights to be confronted by the witness against him and to be present at his trial.

The Connecticut Supreme Court, with Chief Justice Peters authoring the majority opinion, remanded the case to the Superior Court for further proceedings. In express reliance upon the constitution of the state of Connecticut as well as the federal constitution, the Connecticut Supreme Court held that ". . . in criminal prosecutions involving the alleged sexual abuse of children of tender years, videotaping and testimony of a minor victim outside the physical presence of the defendant is a constitutionally permissible practice if, and only if, the state proves by clear and convincing evidence a compelling need to exclude the defendant from the witness room during the victim's testimony." 204 Conn. at 707. The majority of the Connecticut Supreme Court emphatically rejected the proposal of the petitioner that the court should ". . . presume that the credibility of a minor victim's testimony will be improved by excluding the defendant from the witness room during the witness' testimony." 204 Conn. at 704. The full Connecticut Supreme Court denied the petitioner's motion to reargue without opinion.

REASONS FOR DENYING THE WRIT

A.

THE CONNECTICUT SUPREME COURT'S JUDGMENT RESTS ON AN INDEPENDENT AND ADEQUATE STATE GROUND

The primary reason for rejection of the petition is that the holding of the Connecticut Supreme Court expressly rests ". . . not only on the mandates of the federal constitution, but also on independent and adequate state grounds. U.S. Const., amends. VI, XIV, Conn. Const., art. 1, § 8; see *Michigan v. Long,* 463 U.S. 1032, 1041, 103 S.Ct. 3469, 77 L.Ed 2d 1201 (1983)." *State v. Jarzbek,* 204 Conn. 683, 707, 529 A.2d 1245 (1987). The citation by the Connecticut Supreme Court to this Court's decision in *Michigan v. Long, supra,* conveyed that this decision and specific holding was intended to be an exercise of the "clearer opportunity to develop state jurisprudence unimpeded by federal interference" envisioned by the U.S. Supreme Court. Such intention is recognized in the dissenting opinion in *State v. Jarzbek, supra,* in which the two dissenting Justices noted that "[w]e shall never know whether the majority's reliance in this case upon the federal constitution is well founded or otherwise, because the majority opinion has precluded a more authoritative determination of that question by exercising the option given to state courts for avoiding review of their decision by the United States Supreme Court in accordance with *Michigan v. Long,* (citation omitted)." *State v. Jarzbek, supra,* at 712 (Shea, J. dissenting).

Although the petitioner is compelled to concede that the independent and adequate state constitutional ground relied upon the Connecticut Supreme Court would ordinarily foreclose federal review (Petition at 23), petitioner seeks departure from the clear language in *Michigan v. Long, supra.* The argument that the majority decision is solely the product of an analysis of federal constitutional authority or state cases construing federal constitutional law is erroneous. The majority noted that it considered the defendant's claim of a

denial of a right to be present at his trial to be subsumed under his claim grounded on the federal and state constitutional confrontation clauses. *State v. Jarzbek, supra,* at 697 n.8. The decision therefore is a further development of state jurisprudence preceded in the recent past by the Connecticut Supreme Court's decision in *State v. Simino,* 200 Conn. 113, 509 A.2d 1039 (1986) and *State v. Drakeford,* 202 Conn. 75, 519 A.2d 1194 (1987). Those decisions addressed comparable issues of presence of a defendant at trial subjected to an analysis of state statutory and constitutional law. The majority in the case at bar in an analysis of state law relating to presence at trial, found that "[a]ffording the defendant an opportunity to view the proceedings from behind a one-way mirror, however, it not the equivalent of affording him a right to be present." *State v. Jarzbek, supra,* at 697 n.8.

The absence of lexicological difference between the state and federal confrontation clauses does not *ipso facto* support the granting of the instant petition. *See, e.g., State v. Cohane,* 193 Conn. 474, 498–99 n.19, 479 A.2d 763, *cert. denied,* 469 U.S. 990 (1984). This is not a case, however, such as *Three Affiliated Tribes v. World Engineering,* 467 U.S. 138 (1984) cited by the petitioner wherein the state court has proceeded on an incorrect perception of federal law. *Id.* at 152. The majority decision could not have been more explicit in stating that it concluded that ". . . the *state's interest* in protecting the well-being of children, in and of itself, does not justify a per se rule that infringes on a defendant's right of confrontation." *State v. Jarzbek, supra,* at 703 (emphasis added). The determination of the interests of the state of Connecticut as balanced with state constitutional provisions must be reposed with the Connecticut Supreme Court.

B.

PETITIONER'S AUTHORITIES DISTINGUISHABLE

Petitioner argues that this Court hold the petition pending the decisions in the cases of *Iowa v. Coy*, 397 N.W.2d 730 (Iowa 1987), *prob. juris. noted sub nom. Coy v. Iowa*, ____ U.S. ____, 107 S.Ct. 3260 (1987), Supreme Court No. 86-6757 and *State v. Tafoya*, 105 N.M. 117, 729 P.2d 1371 (Ct. App.), *cert. denied*, 105 N.M. 94, 728 P.2d 845 (1986), *pet. for cert. filed sub nom. Tafoya v. New Mexico*, 55 U.S.L.W. 3608 (Feb. 12, 1987) (No. 86-1343). Neither of those cases, however, involved claims of deprivation of state constitutional rights. The decision of the Connecticut Supreme Court that the state constitution contains no justification for automatically depriving all criminal defendants of the right of physical confrontation during videotaping of a minor victim's testimony will not be resolved by this Court's decisions in *Coy* and *Tafoya*.[1] The protection of individual rights secured to the citizens of Connecticut have long been the subject of the state's Supreme Court and said court has often construed the state constitution to afford more substantive protection to citizens than does the federal constitution.

> "[i]n the area of fundamental civil liberties — which includes all protections of the declaration of rights contained in article first of the Connecticut constitution — we sit as a court of last resort, subject only to the qualification that our interpretations may not restrict the guarantees accorded the national citizenry under the federal charter. In such constitutional adjudication, our first referent is Connecticut law and the full panoply of rights Connecticut residents have come to expect as their due. Accordingly,

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[1] It must be emphasized that the state agreed that the U.S. and Connecticut constitutions afforded the criminal defendant the right physically to face those who testify against him. *See, State v. Jarzbek*, 204 Conn. at 692. No such agreement was reached with the prosecution in either the *Coy* or *Tafoya* decisions.

decisions of the United States Supreme Court defining fundamental rights are persuasive authority to be afforded respectful consideration, but they are to be followed by Connecticut courts only when they provide no less individual protection than is guaranteed by Connecticut law." *Horton v. Meskill*, 172 Conn. 615, 641-42, 376 A.2d 359 (1977); *State v. Kimbro*, 197 Conn. 219, 234 n.16, 496 A.2d 498 (1985).

Accordingly, the right of the Connecticut Supreme Court to afford its citizens the constutitional protections set forth in the decision in *State v. Jarzbek, supra*, should not be subject to review.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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